

## Against the Grain

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# Questions and Answers--Copyright Column

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# Questions & Answers — Copyright Column

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**QUESTION:** *An academic librarian asks about the new decision in the Authors Guild v. Google case and whether the decision in favor of Google is likely to be appealed.*

**ANSWER:** On October 16, 2015, the Second Circuit U.S. Court of Appeals affirmed a lower court decision in favor of **Google**. (See <http://law.justia.com/cases/federal/appellate-courts/ca2/13-4829/13-4829-2015-10-16.html>, for the full opinion). The opinion is a major win for fair use and basically finds that the scanning of books and making snippets available to users, which **Google** began in 2005, is fair use. The court held that the fact **Google** is a for-profit company does not disqualify it from claiming fair use. The court then applied the four fair use factors.

(1) *Purpose and character of the use.* The court held that **Google's** scanning of entire works was highly transformative since entire works were not made available to users, but scanning was necessary to enable the searching. The snippets offer significant information about the books, and not the books themselves. The snippets provide a way to search the work and that contributed to the finding of transformativeness. (2) *Nature of the copyrighted work.* The court pointed out that this factor seldom plays an important role in fair use determinations. Moreover, whether the works are fiction or nonfiction is not "dispositive in a fair use determination." (3) *Amount and substantiality used.* While copying small portions is more likely to be fair use, there is no rule that copying an entire work cannot be fair use. Here, the copying was appropriate to **Google's** transformative purpose. Further, the snippets are limited to three per work, each snippet is no longer than one-eighth of a page and works such as cookbooks and dictionaries are excluded from having snippets provided. (4) *Effect on the market for or value of the work.* **Google's** scanning and snippets do not substitute for the original work. In fact, the snippet view "does not threaten the rights holders with any significant harm to the value of their copyrights or diminish their harvest of copyright revenue."

The Second Circuit rejected the three **Authors Guild** arguments: (1) that authors had a derivative right in the application of the search and snippet view functions to their works; (2) that **Google Books** exposed the authors' books to the risk of hacking; and (3) that **Google's** distribution of the digital copies to libraries exposed the books to risks of loss. Partner libraries contributed books to be scanned by **Google** and **Google** then provided those libraries with a digital copy of the book as well as returned the original. The court found that this was not a problem since the libraries' use of those digital copies were restricted by contract to use its digital copy only as consistent with the copyright law and the library is required to take precautions to prevent dissemination

of their digital copies to the public at large. There was no proof that libraries had violated this requirement.

So, is the case now over? No, the **Authors Guild** has announced that it will appeal to the U.S. Supreme Court. **Mary Rasenberger**, Executive Director of the **Guild** stated that the Second Circuit did not understand the grave impact that the decision will have on the potential income of authors. The Court may or may not decide to hear the appeal. It typically does so when there is disagreement among the circuit courts. Experts differ on whether such disagreement among the circuits exists on this issue. For an excellent discussion of the case, see ARL policy notes at: <http://policynotes.arl.org/?p=1200>.

**QUESTION:** *A school librarian asks about the interlibrary loan of books and other works.*

*How many times does a loan request become too many so that the library should consider purchasing the book? What is a reasonable loan period?*

**ANSWER:** The CONTU Guidelines apply to photocopying or other reproduction of works. If the original copy of a book is lent, the CONTU Guidelines do not apply since they deal only with reproduction of copyrighted works. The suggestion of five contained within the Guidelines apply to journal articles that are reproduced for the borrowing library. With books, the Guidelines say that a borrowing library may request a reproduction of a portion of work five times per year within the life of the copyright. At some point after that, the library should purchase the book from which it continues to request reproduced portions. If the borrowing library is borrowing only the original copy and there is no reproduction, there is no limit on how many times it may be borrowed, although the lending library may have a limit.

Academic libraries are likely to have loan periods for books ranging from a couple of weeks to six weeks, or even a semester. Whatever term the library sets is reasonable.

**QUESTION:** *Many university libraries along with the Authors Alliance and Authors Guild recommend that authors retain their own copyrights. A university press employee asks whether language in their contracts should be amended. The current language reads: "The Author grants and assigns exclusively to the Press for the full term of any copyright, all rights to print, publish, reproduce, display publicly, and sell the Work in all forms, languages, and media (including ebook) throughout the world, and the exclusive right on the Author's behalf to license, sell, or otherwise dispose of subsidiary rights in the Work..."*

**ANSWER:** University presses perform very important functions for academic authors. However, today it is easier for authors to manage their copyrights than it was in the past due to the Internet. The distinction is whether the author has assigned his or her rights (meaning a complete transfer of the copyright) or licensed the rights to the press (which does not transfer ownership). If the university press is assigned the copyright, it owns the copyright which should be registered in the name of the press and not the author.

An ideal approach today is author ownership of the copyright with an exclusive license to the press. It is simply a more modern approach that provides the press with all the rights it needs and still permits the author ownership.

**QUESTION:** *How does the availability of inexpensive scanning devices affect the new Google decision? Will libraries now be able to scan whatever they want and use the digital copies?*

**ANSWER:** A Chinese company named **CzurTek** is developing a book scanner it plans to sell for only \$169. This certainly will make scanners widely available even for small libraries. The **Google** decision finds that **Google's** scanning is fair use, but **Google** does not make digital copies available to users. Instead, it is scanning to create a database that is aimed at searching the 20 million books it has scanned. A user may find up to three snippets from a book to determine if the user wants to purchase or borrow the book from a library. Other entities could create similar databases and develop restricted search techniques. But libraries just scanning widely and making digitized copyrighted works available with no restrictions would not comply with the **Google** decision.

**QUESTION:** *A public librarian asks how one determines if graphic images are copyrighted.*

**ANSWER:** Unless one is absolutely sure that an image is public domain, assume that is protected by copyright since copyright attaches automatically. There are a number of sources for both public domain and royalty free images on the Internet and a quick search using the term "public domain images" will reveal them. After consulting these sources, look at Flickr and other image archives to see if the particular image is included and if copyright information is included.

If after a thorough search no copyright information has been located, then the library can make a decision about whether to use the image and assume the risk that a copyright owner will come forward and demand royalties or whether to find another image to substitute. 🐼

